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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN ESPINOZA, an individual,

Plaintiff,

-vs-

CITY OF IMPERIAL, a public entity; MIGUEL COLON, an individual; IRA GROSSMAN, an individual; and DOES 1 THROUGH 50, inclusive,

Defendants.

CASE NO.: 07CV2218 LAB (RBB)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CITY OF IMPERIAL AND MIGUEL COLON TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Assigned to: Hon. Larry Alan Burns, Courtroom 9, 2nd Floor

MOTION
DATE: June 2, 2008
TIME: 11:15 a.m.
COURTROOM: 9

Action Filed: 11/20/07

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CITY OF IMPERIAL AND MIGUEL COLON TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

I. INTRODUCTION

Defendants raise numerous challenges to the sufficiency of Plaintiff's First Amended Complaint. However, absent introduction of extrinsic evidence, Defendants alleged defects in the pleading must appear on the face of Plaintiff's Complaint. As discussed in this Memorandum, Plaintiff has sufficiently alleged his causes of action. Defendant's have not demonstrated merit for their various attacks on the causes of action and therefore the Motion to Dismiss should be denied. In the event that this Court is inclined to grant any portion of Defendants' Motion, Plaintiff respectfully requests leave to amend the Complaint.

II. STATEMENT OF FACTS

The pertinent allegations as indicated in Plaintiff's Complaint (First Amended Complaint, filed March 14, 2008) are essentially as follows:

Plaintiff was employed as a Police Officer by the CITY OF IMPERIAL in or about 2002. Plaintiff alleges that he was terminated from employment because of disability or perceived disability and in retaliation for his protected martial status, protected union activity, and for requesting family leave. Plaintiff also alleges that he was discriminated against, that he was denied reasonable accommodation, that his privacy rights were violated, and that he was defamed. Plaintiff alleges that all the Defendants were the agents of the others.

Plaintiff alleges that his separation and later marital dissolution with his ex-wife was contentious and mentally stressful, but that the unfortunate circumstances did not affect the performance of his duties for Defendants. Defendants, without Plaintiff's consent, disclosed private and confidential information about Plaintiff to third parties, including, but not limited to,

the entire police force of IMPERIAL. Plaintiff's allegations of harassment arise from the Police Chief Defendant COLON'S conduct in interfering with Plaintiff's private and confidential matters. Plaintiff alleges that COLON caused a police report to be falsified, in violation of state and federal law, in order to accomplish a wrongful termination of Plaintiff.

Shortly after Plaintiff requested newborn family care leave, Plaintiff was wrongfully required to undergo an unwarranted psychological examination, conducted by Defendants COLON and GROSSMAN. Defendant GROSSMAN, among other things, made false statements regarding Plaintiff, in writing, to the other Defendants, that Plaintiff lacked integrity, and falsely concluded that Plaintiff was unfit for duty. Plaintiff alleges that Defendants acted with actual malice and reckless disregard for the truth.

Ultimately, the foregoing allegations form the basis for Plaintiff's claims for civil rights violations and wrongful termination in violation of public policy. Defendant GROSSMAN challenges the legal sufficiency of Plaintiff's claims for defamation, invasion of privacy, and intentional infliction of emotional distress against him. The only facts presented by Defendant in support of his motion are the allegations of Plaintiff's Complaint. *See* Defendant's Request for Judicial Notice.

III. LEGAL ARGUMENT

A. STANDARD OF REVIEW ON MOTION TO DISMISS

In reviewing a Rule 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.* (9th Cir. 1998), 139 F3d 696, 699. The test is whether the facts, as alleged, support any valid claim entitling plaintiff to relief, not necessarily the one intended by plaintiff. Thus, a complaint should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts alleged support any valid theory. *Haddock v. Board of Dental Examiners of Calif.* (9th Cir. 1985) 777 F2d 462, 464. Moreover, Rule 12(b)(6) dismissals are "especially disfavored in cases

where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Baker v. Cuomo* (2nd Cir. 1995) 58 F3d 814, 818–819.

When a complaint's allegations are capable of more than one inference, the court must adopt whichever inference supports a valid claim. *Columbia Natural Resources, Inc. v. Tatum* (6th Cir. 1995) 58 F3d 1101, 1109. Some courts hold motions to dismiss civil rights complaints should be "scrutinized with special care." *Lillard v. Shelby County Board of Ed.* (6th Cir. 1996), 76 F3d 716, 724 (internal quotes omitted), *See also, Johnson v. State of Calif.* (9th Cir. 2000) 207 F3d 650, 653 (liberal construction rule particularly important in civil rights cases).

B. DEFENDANT COLON CAN BE LIABLE ON THE FIRST AND THIRD CAUSES OF ACTION IN HIS OFFICIAL CAPACITY AND ON THE FIFTH CAUSE OF ACTION IN HIS INDIVIDUAL CAPACITY.

Under the authority of *Reno v. Baird*, 18 Cal.4th 640, and *Janken v. G.M. Hughes*, 46 Cal.App.4th 55, supervisory employees can be held liable in their official capacities for ADA and FEHA Discrimination. While the consensus among Federal Courts is that individual supervisors cannot be individually liable, it is well established that public officials can be held liable in their official capacities for disability discrimination. "[S]ince 1993, eight federal circuits have either (1) held that the "agent" language does not create individual liability for discrimination, or (2) found that, although individuals can be sued in their official or representative capacity, they may not be sued in their individual capacity and have no personal liability, or (3) interpreted similar language in a state statute as not creating individual liability." 18 Cal.4th 640, at 648 (emphasis added).

As for Plaintiff's retaliation claims, "[e]very federal district court that has considered this issue since *Reno* has also concluded that *Reno* does not apply to retaliation. *E.g., Peterson v. Santa Clara Valley Medical Center,* 2000 WL 98262 (N.D.Cal.2000); *Soo v. United Parcel Serv., Inc.,* 73 F.Supp.2d 1126 (N.D.Cal.1999); *Liberto-Blanck v. City of Arroyo Grande,* 33 F.Supp.2d 1241 (C.D.Cal.1999); *Kaminski v. Target Stores,* 1998 WL 575097 (N.D.Cal.1998).

We conclude that an individual-supervisor may be held personally liable for retaliation under the FEHA." *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276.

C. DISCRETIONARY IMMUNITY DOES NOT APPLY TO BAR THE THIRD AND SIXTH CAUSES OF ACTION.

Defendants rely heavily on *Caldwell v. Montoya* (1995), 10 Cal.4th 972, 42 Cal.Rptr.2d 842, for the proposition that the Defendant in this action is immune for exercising his discretion. In fact, however, the immunity does not apply.

As explained in by the California Supreme Court in *Caldwell*, *Johnson v. State* (1968), 69 Cal.2d 782, 73 Cal.Rptr. 240, was the first case to construe Government Code §820.2, and remains as the applicable framework in determining discretionary act immunity under that section. *Caldwell* involved a school board's decision not to renew the employment contract of its then 66-year-old superintendent, Richard Caldwell. Caldwell alleged breach of contract, violation of FEHA (racial and age discrimination), and retaliatory discharge in violation of public policy and the defendants claimed immunity under §820.2.

Essentially, the immunity to government officials is granted for so-called "policy" decisions but not "operational" decisions. In addition to the threshold issue of whether the act complained of actually implicates policy concerns (and not merely implementation of a basic policy already formulated), in order for immunity to exist, the public entity must have actually engaged in a weighing of factors, in other words, a considered decision.

> Under these circumstances, *Johnson* concluded, a 'workable definition' of immune discretionary acts draws the line between 'planning' and 'operational' functions of government. (*Johnson*, *supra*, 69 Cal.2d at pp. 793, 794.) Immunity is reserved for those '*basic policy decisions* [which have] ... been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' (*Id.* at p. 793, italics in original.) Such 'areas of quasi-legislative policy-making ... are sufficiently sensitive' (*id.* at p. 794) to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' (*id.* at p. 793).

> On the other hand, said *Johnson*, there is no basis for immunizing lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated. (*Johnson*, *supra*, 69 Cal.2d at p. 796.) Moreover, we cautioned, immunity applies only to *deliberate and considered* policy decisions, in which a '[conscious] balancing [of] risks and advantages ... took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision. [Citations].' (*Id.* at p. 795, fn. 8.)
> Recognizing that 'it is not a tort for government to govern' (*Dalehite v. United States* (1953) 346 U.S. 15, 57 [97 L.Ed. 1427, 1452, 73 S.Ct. 956] (dis. opn. of Jackson, J.)), our subsequent cases have carefully preserved the distinction between policy and operational judgments. Thus, we have rejected claims of immunity for a bus driver's decision not to intervene in one passenger's violent assault against another (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 793-795 [221 Cal.Rptr. 840, 710 P.2d 907]), a college district's failure to warn of known crime dangers in a student parking lot (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 815 [205 Cal.Rptr. 842, 685 P.2d 1193]), a county clerk's libelous statements during a newspaper interview about official matters (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 415-416 [134 Cal.Rptr. 402, 556 P.2d 764]), university therapists' failure to warn a patient's homicide victim of the patient's prior threats to kill her (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 444-447 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]), and a police officer's negligent conduct of a traffic investigation once undertaken (*McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261-262 [74 Cal.Rptr. 389, 449 P.2d 453]).
>
> *Caldwell v. Montoya* (1995), 10 Cal.4th 972, 981-982, (internal quotations, emphasis, and citations in original)

Caldwell further reasons that the decision not to renew Caldwell's employment contract qualifies as a discretionary act with in the meaning of 820.2. "[T]he decision about who should serve as superintendent of a school district particularly satisfies the immunity justifications set forth in Johnson." *Caldwell*, at 982. "The superintendent…is the district's foremost appointed official, with primary responsibility for representing, guiding, and administering it." Indeed, the Supreme Court clearly indicated the narrowness of its holding in the first sentence of the opinion, stating: "In this case, we confront a narrow but important issue: are individual members of an elected school board immune from a suit seeking damages against them personally for their successful votes to terminate the employment of the school district's superintendent, even when the complaint alleges race and age discrimination in violation of California's Fair Employment and Housing Act?" *Id.* at 975-976.

In contrast, it is undisputed that ESPINOZA was a police officer. The individual defendant, COLON, is not a member of the CITY'S governing board nor does he have the power to vote on CITY policy. This case does not involve a position, such as superintendent, that "particularly satisfies" the immunity justifications. It is not a position with primary responsibility for representing, guiding and administering the public entitiy's broad-based policies. Rather, the Defendant's acts and omissions alleged are "ministerial" and merely the "lower-level" decisions that implement a basic policy already formulated.

> The statutes specifically limit the length of a superintendent's contract and otherwise place the superintendent's employment within the sole authority and discretion of the district's governing board. (Ed. Code, §§ 35010, 35026, 35031, 35163, 35164.) The matter is therefore "expressly entrusted to a coordinate branch of government" at its highest level. (*Johnson, supra,* 69 Cal.2d at p. 793.) The superintendent, in turn, is the district's foremost appointed official, with primary responsibility for representing, guiding, and administering it. (Ed. Code, § 35035.) The governing board's choice about who should occupy this crucial post is therefore a peculiarly sensitive and subjective one, with fundamental policy implications. There is a "vital public interest" (see *Lipman, supra,* 55 Cal.2d at p. 230) in encouraging *both* unfettered debate and judgment about the issue *and* candid public explanation by the politically accountable board members of the reasons for their votes
>
> 10 Cal.4th 972, 983-984 (internal quotations, emphasis, and citations in original)

This case clearly falls within the ministerial act exceptions to discretionary immunity and is readily distinguishable from *Caldwell*. Defendant is not immune under §820.2 as a matter of law. This Court need not even reach the issue of whether a considered decision was made.

D. DEFENDANT CITY IS NOT IMMUNE FROM LIABILITY FOR THE THIRD AND SIXTH CAUSES OF ACTION PURSUANT TO SECTION 815.2 OF THE CALIFORNIA GOVERNMENT CODE AS A MATTER OF LAW.

Caldwel v. Montoya (1995), 10 Cal.4th 972, does not support Defendants' circular and misleading argument that where the Individual Defendant is immune, so too is the public entity Defendant. The *Caldwell* Court stated:

> Nothing we say here is intended to imply that because the individual board members are immune, plaintiff's FEHA claim against *PUSD itself* is also barred. Section 815.2 does generally provide that a public entity is liable for an employee's act or omission within the scope of employment if the employee himself could be sued (subd. (a)), but that the entity is immune if the employee is immune (subd. (b)). We observe, however, that section 815.2 simply applies principles of *vicarious* entity liability. In subdivision (b), it establishes the premise that if the directly liable employee himself cannot be sued, the doctrine of respondeat superior should not apply against the entity. (See *Bradford v. State of California* (1973) 36 Cal.App.3d 16, 20 [111 Cal.Rptr. 852].) However, FEHA creates *direct* statutory rights, obligations, and remedies between a covered "employer," private or public, and those persons it considers or hires for employment. (§§ 12926, subd. (d), 12940, subds (a), (c)-(k), 12941, 12942, 12945, 12945.2, 12945.5, 12946, 12947.5, 12950, 12965.) FEHA thus provides a basis of direct entity liability independent of the derivative liabilities addressed in section 815.2. Accordingly, any personal immunity of a public employee against a particular FEHA claim does not necessarily accrue to the benefit of the public entity itself as a covered "employer." (See *Bradford*, *supra*, 36 Cal.App.3d at p. 20; also cf. *Ramos v. County of Madera*, *supra*, 4 Cal.3d 685, 695.) In any event, the issue of entity immunity is not before us in this case, and we do not decide it.
>
> 10 Cal.4th 972, 989, footnote 9 (internal quotations, emphasis, and citations in original)

The CITY OF IMPERIAL'S liability under the Third and Sixth Causes of Action are predicated on its direct liability. It is not immune under Government Code §815.2.

E. PLAINTIFF'S ALLEGATIONS ARE SUFFICIENT TO STATE A CAUSE OF ACTION FOR DISABILITY DISCRIMINATION, HARASSMENT AND RETALIATION UNDER THE ADA AND CALIFORNIA FEHA.

Plaintiff has adequately alleged the adverse actions, disability discrimination, harassment, and retaliation. Primarily, it is alleged that Plaintiff was terminated for his disability. For example:

> 23. During his employment, ESPINOZA was subjected to adverse employment action, harassment, and hostile work environment, primarily by his supervisor, Defendant COLON, but with the ratification and conspiracy of the other Defendants. Plaintiff was denied assignments that he was qualified for. Defendants interfered with Plaintiff's personal life, invaded Plaintiff's privacy by disclosing confidential information regarding Plaintiff to third parties, brought numerous false disciplinary charges against Plaintiff, engaged in harassment, and created a hostile

> work environment for Plaintiff, all apparently in order to wrongfully manufacture false grounds to terminate Plaintiff. Plaintiff's termination was without any legitimate cause. All disciplinary actions against Plaintiff have been brought to final conclusion, with no termination being imposed.
>
> 24. Plaintiff alleges that Defendants wrongfully terminated Plaintiff in violation of the collective bargaining agreement and state and federal law, without proper cause, and in violation of due process. Defendants wrongfully terminated Plaintiff, among other things, in retaliation for his participation in union and/or political activity, his exercise of his Constitutional rights, and for his marital status. Defendant CITY'S policies limited, segregated and classified persons such as Plaintiff on the basis of protected characteristics.
>
> Plaintiff's Complaint, page 6.

Plaintiff respectfully requests leave to amend the Complaint in the event this Court grants Defendants Motion. In reviewing a Rule 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.* (9th Cir. 1998), 139 F3d 696, 699. The test is whether the facts, as alleged, support any valid claim entitling plaintiff to relief, not necessarily the one intended by plaintiff. Thus, a complaint should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts alleged support any valid theory. *Haddock v. Board of Dental Examiners of Calif.* (9th Cir. 1985) 777 F2d 462, 464.

F. DEFENDANT COLON CAN BE HELD LIABLE IN HIS OFFICIAL CAPACITY ON THE SECOND AND FOURTH CAUSES OF ACTION.

Under the authority of *Reno v. Baird*, 18 Cal.4th 640, and *Janken v. G.M. Hughes*, 46 Cal.App.4th 55, supervisory employees can be held liable in their official capacities for ADA and FEHA Discrimination. While the consensus among Federal Courts is that individual supervisors cannot be individually liable, it is well established that public officials can be held liable in their official capacities for disability discrimination. "[S]ince 1993, eight federal circuits have either (1) held that the "agent" language does not create individual liability for discrimination, or (2) found that, although individuals can be sued in their official or representative capacity, they may

not be sued in their individual capacity and have no personal liability, or (3) interpreted similar language in a state statute as not creating individual liability." 18 Cal.4th 640, at 648.

G. PLAINTIFF'S ALLEGATIONS ARE SUFFICIENT TO STATE A CAUSE OF ACTION FOR DISABILITY DISCRIMINATION, HARASSMENT AND RETALIATION UNDER THE ADA AND CALIFORNIA FEHA.

Defendants assert that a qualified immunity applies to because Plaintiff has "failed to allege COLON violated a clearly established statutory or constitution right of which a reasonable person would have known". Plaintiff alleges several clearly established statutory rights of which a reasonable person would have known. For example, Paragraph 128 alleges that:

> 128. At all times relevant to this action, among other things, the United States Americans with Disabilities Act, California Fair Employment and Housing Act, Government Code §§12900 et seq., prohibiting harassment, discrimination, and retaliation on the basis of disability and marital status and exercise of leave rights, California Labor Code 132a, prohibiting discrimination against injured workers, California Labor Code §1101, et seq., prohibiting discharge of employees for engaging in political activities, California Labor Code §1050, prohibiting blacklisting, California Labor Code §922, et seq., prohibiting discharge of employees for engaging in union activity, California Government Code §12945.2, protecting leave rights for newborn care, California Civil Code §44, et seq., prohibiting defamation, California Government Code §3300, et seq., the "Peace Officers Bill of Rights", and California Penal Code §134, et seq., prohibiting false evidence and false report of crimes, were in full force and effect and were binding on Defendants.

Surely, Defendant COLON, a police officer himself, would have known of the "Peace Officer's Bill of Rights", Government Code §3300 et seq. Accordingly, Defendant is not shielded from liability for civil damages as his conduct violated these clearly established rights, which a reasonable person would have known. In fact, Defendants treated Plaintiff's termination as a disciplinary action, though it was based on a purported mental inability to perform the job. Defendants should have applied for Plaintiff's disability retirement on Plaintiff's behalf, but has failed to perform this mandatory duty as clearly expressed in California Government Code §21153.

H. PLAINTIFF'S EIGHTH CAUSE OF ACTION SHOULD WITHSTAND DEFENDANTS' MOTION TO DISMISS AS A VALID CLAIM CANNOT BE DISMISSED SO LONG AS THE FACTS ALLEGED SUPPORT ANY VALID THEORY.

The test is whether the facts, as alleged, support any valid claim entitling plaintiff to relief, not necessarily the one intended by plaintiff. Thus, a complaint should not be dismissed because plaintiff erroneously relies on the wrong legal theory if the facts alleged support any valid theory. *Haddock v. Board of Dental Examiners of Calif.* (9th Cir. 1985) 777 F2d 462, 464.

I. PLAINTIFF'S NINTH CAUSE OF ACTION FOR INVASION OF PRIVACY IS SUFFICIENTLY PLEAD.

As a matter of law, Plaintiff did have a reasonable expectation of privacy with regard to his personal and confidential information. The "zones of privacy", California Constitution, Article I, section I, creates a right of action against private as well as government entities and extend to legally recognized privacy interests in the details of a patient's medical and psychiatric history. *See Hill v. National Collegiate Athletic Assn.* (1994), 7 Cal.4th 1. "Indeed the Legislature recognized as much when it enacted section 56.10, allowing health care providers to disclose only narrow categories of medical information about employees, and then only for certain narrow purposes" An employee's right of privacy is one that helps workers maintain an aura of competence, efficiency, professionalism, social propriety, and seriousness of purpose, allowing them to perform their duties to the satisfaction of their employers but simultaneously to protect their job security and, thus, their economic well being.

As a matter of fact, Plaintiff has never placed his mental ability in issue. It was Defendant's pretextual examination, which forms the basis of the privacy claim. Defendants, without Plaintiff's consent, disclosed private and confidential information about Plaintiff to third parties, including, but not limited to, the entire police force of IMPERIAL. Plaintiff's allegations

of harassment arise from the Police Chief Defendant COLON'S conduct in interfering with Plaintiff's private and confidential matters. [See Plaintiff's Complaint, Paragraphs, 11, 18, 19].

J. DEFENDANT COLON MAY BE HELD LIABLE FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY.

Defendants rely on *Reno v. Baird*, 18 Cal.4th 640, and *Janken v. G.M. Hughes*, 46 Cal.App.4th 55, indicate that individual supervisors cannot be held liable in their individual capacities for ADA and FEHA Discrimination and wrongful discharge in violation of public policy claims. However, *Reno* is equally clear that individual defendants can be held liable in their official capacities. *See also Hafer v. Melo,* 502 U.S. 21. Accordingly, Defendant COLON can be held liable in his official capacity.

K. DEFENDANTS CHALLENGE TO WRONGFUL TERMINATION CONTRACT CLAIMS ARE NOT APPLICABLE TO THIS ACTION.

Defendants' argument that express and implied contract claims must fail appears to be misplaced. Plaintiff, in fact does not allege such claims. Thus the argument is moot.

L. PLAINTIFF IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES OR MANDAMUS BEFORE MAINTAINING THIS ACTION.

Recent authority on point is *Ortega v. Contra Costa Community College Dist.*, 156 Cal.App.4th 1073, 67 Cal.Rptr.3d 832. In *Ortega* a community college district's internal grievance procedure was created by collective bargaining agreement (CBA) and culminated in arbitration. Neither administrative nor judicial exhaustion applied to bar claims against the public entity district by a former community college football coach who challenged his demotion and termination as discriminatory under Fair Employment and Housing Act (FEHA), despite fact

that he had chosen to initiate grievance procedure provided in CBA following each adverse employment action.

> Because the CBA provides for arbitration of employee complaints, Ortega's utilization of this grievance process does not bar his state court FEHA actions against the District. In both his demotion and his termination cases, Ortega alleged that he timely filed a complaint with the DFEH, and this is sufficient to plead exhaustion. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 721, 17 Cal.Rptr.3d 374 (*Williams*)...
> In each of his two lawsuits, Ortega sought nonstatutory relief in addition to the relief he sought under the FEHA. We conclude he was not required to exhaust the available administrative procedures for these nonstatutory claims.
>
> 156 Cal.App.4th 1073, 1086

M. PLAINTIFF'S DEFAMATION ACTION HAS BEEN SUFFICIENTLY ALLEGED.

Defendants claims the alleged defamation has not been specified in the Complaint. In fact, in regards to Defendant GROSSMAN'S anti-SLAPP Motion, Plaintiff presents evidence regarding specific allegations of defamation. Essentially, Defendants defamed Plaintiff in publishing the false statement that Plaintiff lacked integrity. *See* Declaration of Vincent J. Tien in Opposition to Grossman's anti-SLAPP Motion.

N. THE ALLEGED DEFAMATORY COMMUNICATIONS WERE NOT PRIVILEGED.

Pettus v. Cole (1996), 49 Cal.App.4th 402, involved the disclosure of two psychiatric evaluations in connection with the employee's request for stress-related disability leave. The Court held that the disclosures violated the Confidentiality of Medical Information Act since Civil Code §56.10 limits permissible disclosure to a description of any functional limitations that may have entitled the employee to leave work and also explicitly prohibits disclosure of medical cause. Importantly, the Court further held that the psychiatrists' disclosures were not privileged under either Civil Code §47(b) or §47(c), since the evaluations were not done in a judicial or

quasi-judicial proceeding. "The policies underlying this statute are clearly intended to promote the accessibility or viability of the judicial system". "One of the primary factors which determines if a proceeding is quasi judicial is whether the administrative body involved is entitled to hold hearings and decide issues by application of rules of law and to ascertain facts...Pettus's request for leave and the subsequent disability verification procedure involved no such dispute resolution mechanism, no hearings, and the only decision makers involved were a private employer, Du Pont, and its employees and agents." Although Pettus involved a private employment dispute, the facts of this case are similar. Defendants did not hold hearings, there was no dispute resolution mechanism, and the only decision makers were the Defendants and their agents. The governing board of the CITY was not involved in the evaluation forced on ESPINOZA.

In *Gallanis-Politis v. Medina* (2007) 61 Cal.Rptr.3d 701, a county employee's retaliation lawsuit against her supervisors was subject to a motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. The employee's allegations of unprotected activity by supervisors were incidental to her principal claim that supervisors conducted a pretextual investigation and prepared a false report against her, which was undertaken in response to her pending lawsuit. It should be noted that in this action, ESPINOZA is not claiming defamation based on communications after this lawsuit or claim was initiated, but rather on events and conduct that preceded this judicial action, that were not protected by the privilege.

In light of California Civil Code §47.5, which provides that, notwithstanding the CC § 47(b) privilege, one who files a complaint with a peace officer's employer charging the officer with misconduct, criminal conduct or incompetence may be liable for defamation if the complaint was *knowingly false* and made with *spite, hatred or ill will* (emphasis added).

One court held that, by restricting defamatory speech against peace officers while leaving intact the CC § 47(b) privilege against all other public officials, CC § 47.5 represents *unconstitutional content-based discrimination*. *See Walker v. Kiousis* (2001) 93 CA4th 1432, 1446- 1457.

However, more recent authority in *Loshonkohl v. Kinder* (2003) 109 CA4th 510, 515-518, has held that § 47.5 is constitutional in view of a post-*Walker* Supreme Court case, *People v. Stanistreet* (2002) 29 C4th 497, that upheld the constitutionality of a statute (Pen.C. § 148.6) making the filing of a knowingly false misconduct allegation against a peace officer a misdemeanor. The exception applies here, where the complaint of police officer misconduct or incompetence was made to ESPINOZA'S Police Department employer. Plaintiff alleges that the communication was made with actual malice and reckless disregard for the truth. Indeed, this exception is expressly discussed in *Shaddox* (at fn. 12, 1417).

Defendant GROSSMAN had no basis to conclude that Plaintiff lacked integrity. Defendant GROSSMAN admitted that he based his conclusion of Plaintiff's lack of integrity on the supposed failure of Plaintiff to disclose the length of time that Plaintiff had been treating with his own family therapist. GROSSMAN admits that he asked ESPINOZA if he had ever been treated by a mental health professional. GROSSMAN admits that ESPINOZA stated in answer to GROSSMAN'S question that he did see a counselor and also took his son to see the counselor. GROSSMAN claims that because ESPINOZA did not disclose the name of the counselor, or the length of time he had seen the counselor, that ESPINOZA was lying. Clearly, ESPINOZA simply answered the question posed by Defendant and Defendant's failure to ask follow-up questions was the reason for his lack of information. It was not an omission on ESPINOZA'S part indicating dishonesty.

O. DEFENDANT'S CONDUCT WAS SUFFICIENT TO SUPPORT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

As indicted in Plaintiff's Complaint, Defendant committed the acts alleged herein maliciously, fraudulently, and oppressively, and with the wrongful intention of injuring plaintiff, and acted with an improper and evil motive amounting to malice or despicable conduct. Alternatively, Defendant's wrongful conduct was carried out with a conscious disregard of plaintiff's rights. As demonstrated, Defendant had no basis to conclude that Plaintiff was lacked

integrity, yet recklessly or intentionally used such a conclusion, knowing the damage it would cause Plaintiff.

IV. CONCLUSION/REQUEST FOR LEAVE TO AMEND.

Based on the foregoing, Plaintiff respectfully requests that this Court deny Defendant's Motion to Dismiss under F.R.C.P. 12(b)(6). In the event that the Court is inclined to grant the motion, Plaintiff respectfully requests leave to amend this complaint to cure any defects. A pleading can be amended to state a cause of action against the Defendants.

LAW OFFICES OF VINCENT J. TIEN

Dated: May 16, 2008

By: s/Vincent J. Tien
VINCENT J. TIEN, Attorneys for Plaintiff, JOHN ESPINOZA

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 17291 Irvine Boulevard, Suite 150, Tustin, California 92780.

On May 19, 2008 I caused to be served the foregoing documents described as: **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CITY OF IMPERIAL AND MIGUEL COLON TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** on the parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

David M. White, Esq.
Susan L. Oliver, Esq.
Mina Miserlis, Esq.
WHITE, OLIVER & AMUNDSON
550 West C Street, Suite 950
San Diego, California 92101

Jeffrey P. Thompson, Esq.
Jennifer K. Berneking, Esq.
DECLUES, BURKETT & THOMPSON, LLP
17011 Beach Blvd., Ste. 400
Huntington Beach, CA 92647-7455

___ BY MAIL: I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Tustin, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on the same day in the ordinary course of business. I am aware that on the motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

___ BY EXPRESS SERVICE CARRIER: I deposited in a box or other facility regularly maintained by _____, an express service carrier, or delivered to a courier or driver authorized by said carrier to receive documents, each such envelope, in an envelope designated by the said express service carrier, with delivery fees paid for.

xx BY FACSIMILE: I caused the foregoing documents to be sent to the addressee(s) above via facsimile.

___ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee above.

___ (STATE) I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

xx (FEDERAL) I declare that I am employed in the office of the member of the bar of this court, at whose direction this service was made.

Executed this 19th day of May 2008 at Tustin, California.

s/Vincent J. Tien
VINCENT J. TIEN, Declarant.